

BEFORE THE
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EXECUTIVE SUMMARY

Southern maintains that the auction process is an inappropriate method for achieving wide-area SMR licensing for the few remaining, viable SMR operators. Auctions will seriously disrupt the regulatory process for incumbent licensees. Even with the auctioning of the lower 80 SMR channels and the reclassified General Category channels on a geographic basis, the Commission ignores the fact that incumbent SMRs, even if they are not subject to mandatory relocation, will be under the old licensing scheme. Therefore, the auction process will not achieve total economies of scale in the licensing process as the Commission anticipates. The Commission cannot, therefore, totally divorce itself from the methods employed under the current 800 MHz licensing rules, and efforts to do so should be abandoned. Moreover, the uncertainties created by the upper 200 SMR auctions and mandatory relocation rules should indicate to the Commission that it ought not tamper with these bands until the upper 10 MHz SMR band is completely licensed under its new rules.

Southern also believes that mandatory relocation rules for incumbents licensed on the upper 200 SMR channels should be fair and must assure full protection for incumbents.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to)
Facilitate Future Development)
of SMR Systems in the 800 MHz)
Frequency Band)

PR Docket No. 93-144

and

Implementation Section 309(j))
of the Communications Act -)
Competitive Bidding 800 MHz)
SMR)

PP Docket No. 93-253

To: The Commission

**COMMENTS OF
THE SOUTHERN COMPANY**

The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's rules, respectfully submits the following Comments on the above-captioned Second Further Notice of Proposed Rule Making ("Second NPRM").^{1/}

^{1/} In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR systems in the 800 MHz Frequency Band and Implementation of
(continued...)

STATEMENT OF INTEREST

1. Southern has been an active participant in this proceeding, filing comments in every phase. Southern is a Specialized Mobile Radio ("SMR") licensee operating a wide-area, digital enhanced 800 MHz system throughout its regional service area.^{2/} Southern has invested millions of dollars in this state-of-the-art digital SMR system and plans to be a commercially-viable competitor to other wide-area SMR licensees. A portion of Southern's 800 MHz SMR system will provide enhanced dispatch communications for internal use by its operating companies. For example, this system transmits local dispatch communications to service crews who respond to calls concerning substations and power lines in routine and emergency situations.

^{1/}(...continued)

Section 309 (j) of the Communications Act -- Competitive Bidding, PR Docket No. 93-144 and PP Docket 93-253, Second Further Notice of Proposed Rule Making, released December 15, 1995, ____ Fed. Reg. ____ (1996), Order extending the Comment date to February 15, 1996 and Reply Comment date to March 1, 1996, adopted January 16, 1996.

^{2/} Southern is an electric utility holding company which wholly owns the common stock of five electric utility operating companies -- Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company -- which together operate an integrated electric utility systems which serves over 11 million consumers in a contiguous area of 122,000 square miles, including most of the State of Alabama, almost all of the State of Georgia, the panhandle of Florida and 23 counties in southeastern Mississippi. Southern's wide-area SMR services are provided through its subsidiary, Southern Communications Services, Inc.

2. Southern also will provide SMR service to state and local governments, utilities, industrial and commercial users and other customers who need the enhanced dispatch, two-way voice, and data transmission capabilities of Southern's wide-area SMR system. The Southern 800 MHz SMR system will provide service for these customers in rural and urban areas corresponding with its utility system operations. Although Southern's system is licensed as an SMR, it employs all categories of 800 MHz frequencies: SMR (upper 200 and lower 80), General Category ("GC"), Industrial/Land Transportation and Business channels.

3. Southern is licensed for 151 SMR channels in the lower 80 SMR band and 307 GC channels which are the subject of this Second NPRM. These channels are vitally important to Southern's business plan to provide wide-area SMR service, and any disruption in the use of these channels will greatly hinder its ability to compete as an SMR licensee. In this regard, Southern has an interest in the outcome of this proceeding, and appreciates this opportunity to comment on the proposals put forth in this rulemaking proceeding.

BACKGROUND

4. In this phase of the proceeding, the Commission proposes to amend the licensing scheme for the lower 80 SMR channels and the GC channels, which have now been reclassified as SMR channels. In doing so, the Commission has proposed to license this spectrum on a geographic basis (using economic areas ("EAs")), and proposes to use the auction process for awarding new licenses. The Commission also proposes to designate this spectrum as an entrepreneurs' block. Finally, the Commission proposes to establish more definite rules concerning the mandatory relocation of incumbent SMRs operating on the upper 200 SMR channels.

COMMENTS

5. Southern believes that the Commission has merely mimicked the recent rules adopted in the upper 10 MHz SMR band and the 2 GHz band, and has misapplied these rules without first making an independent public interest assessment. As a result, Southern believes that this proceeding is, at a minimum, premature.

I. FCC Reliance on the Precedent of the Reallocation of the 2 GHz Band Is Misplaced

6. The Commission desires to analogize the 800 MHz SMR and GC bands to that of the 2 GHz band, and attempts to apply wholesale the same auction and relocation rules to the 800 MHz SMR service. This is an unachievable goal regardless of the adjustment made to the rules. Throughout the Second NPRM the Commission mentions the procedures and rules applied in the 2 GHz band reallocation and relocation proceedings. Second NPRM passim. Southern submits these rules cannot apply to the 800 MHz land mobile rules because of the distinctions in the services. First, in GEN Docket 90-314 and ET Docket 92-9, the Commission decided to reallocate the entire 2 GHz band from private operational-fixed microwave service to the Personal Communications Service. The entire band has been designated for a new communications service. In the aftermath of the PCS auctions, the incumbents would not be faced with being direct competitors with their PCS relocators. To the contrary in this proceeding, the Commission intends to place entities in the same industry, competing for the same customers in a regulatory adverse position. Accordingly, it must at a minimum consider appropriate safeguards to protect competition. By simply copying without deviation its 2 GHz relocation rules, the Commission has failed to give even

minimal attention to these types of public interest concerns. The 800 MHz band, regardless of the licensing process, will maintain its land mobile radio industry nature. No new uses of the band are contemplated. The fact that the FCC will codify its policies concerning wide-area, geographic licensing (to avoid site-specific licensing) is of no relevance regarding how the band is used. Accordingly, the Commission's reliance on the 2 GHz reallocation proceeding as precedent for its action in this proceeding is misplaced.

II. FCC Lacks Statutory Authority to Auction Lower 80 SMR and General Category Spectrum

7. Southern urges the Commission to recall that the "rules of construction" spelled out by Congress in its grant of auction authority requiring the agency to continue to use "engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings.^{3/} Rather than proposing ways to avoid mutual exclusivity, the Commission has created an environment which creates mutual exclusivity in order to justify auctions to

^{3/}

47 U.S.C. § 309 (j)(6)(E).

raise revenues.^{4/} Moreover, Southern does not believe that the Commission has the legal authority to conduct an auction under the circumstances where there is no "spectrum" because the existing spectrum is fully licensed. The Commission's proposal to make available the lower 80 SMR channels and the GC channels for auction is not authorized by the Budget Act. Section 309 (j)(1) provides the statutory authority for the auction mechanism; that section provides, in relevant part:

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

The express language of § 309(j) confers authority to conduct auctions only upon the filing of exclusive applications for an initial license, and only for licenses involving use of the spectrum. The significance of the former requirement is made clear by the fact that, in tailoring § 309(j), Congress expressly excluded applications

^{4/} For example, the FCC's short-form application purposefully has a box marked "all" which allows an applicant at the stroke of a pen to select that it will bid in all markets even though most applicants who select this box do not have any intention or desire to bid for certain markets. Southern submits that this box should be eliminated from the short-form application. Mutual exclusivity would be avoided in many circumstances if the "all" box was absent from the application.

for renewal or modifications from the auction process.^{5/} Congress clearly chose not to expose every license to the possibility of predation by auction. The auction mechanism has no application or relevance to spectrum which is already occupied and licensed. The statute, by its plain language, only authorizes the use of the auction mechanism to license spectrum which, aside from the competing application[s], is otherwise available. Furthermore, Congress has specifically directed the Commission:

"In making a decision pursuant to Section 303 (c) to assign a band of frequencies to use for which licenses . . . will be issued pursuant to this subsection, and in prescribing regulations pursuant to . . . this subsection, the Commission may not base a finding of public interest, convenience and necessity on the expectation of federal revenues from the use of a system of competitive bidding."^{6/}

8. To the extent that there is 800 MHz SMR and GC spectrum available for auctioning, Southern recommends that this spectrum first be made available to applicants under the existing regulatory framework who must meet legitimate licensing needs such as system modification or expansion.

^{5/} Report of the Committee on the Budget, House of Representatives, 253 (1993).

^{6/} Pub. L. No. 103-66. Title VI, § 6002(a), 107 Stat. 312, 390 (1993) (emphasis added).

III. Auctions in the Lower 80 SMR and General Category Bands Undermine Existing SMR Systems

9. Southern maintains, as it did in the first phase of this rulemaking, that the proposals espoused amount to a taking of already licensed spectrum from on-going businesses to force entities to bid for the asset in a different geographic configuration than already licensed. In Southern's view, the Commission proposes to take away the frequencies licensed to existing bona fide SMRs (and other licensees) and require them to either (1) compete financially for the spectrum, (2) co-exist with an auction winner who is able to "freeze" them in place, (3) be "relocated" which disrupts their business, or (4) become subscribers of an auction winner. Not only are these options inequitable, but in Southern's opinion, are contrary to the public interest.

10. Non-auction winners will not have the same flexibility under the proposed 800 MHz SMR rules. The current application freeze prevents these licensees from modifying their systems beyond their current 22 dbu contour. SMRs operating on these channels will be locked into their current authorizations and their current station coverage footprint with no opportunity to expand their systems to accommodate growth. With a complex build-out schedule, and the fine tuning that is inevitable in systems this large,

licensees need flexibility to modify their system design to some degree. Moreover, as utility service mandates change due to increases in demand and population shifts, Southern must reconfigure its communications infrastructure to meet new service requirements. Upgrades in equipment technology also may require modification in the system design that affect the overall coverage areas. SMRs also face situations beyond their control such as non-renewal of antenna tower leases or new zoning regulations both of which could require some changes in the service contour. The Commission must take these circumstances into account before developing overly broad changes to its 800 MHz licensing rules.

11. Furthermore, the proposed auction process is very disruptive to existing SMRs. Regardless of the fact the FCC believes that its "relocation to comparable facilities" doctrine or in the case of the lower 80 and GC channels its "no mandatory relocation" doctrine means that relocatees should not be harmed, the entire auction process creates great regulatory uncertainty for existing businesses (and has real financial consequences) because entities are forced into this new regulatory regime. For Southern, these costs cannot be adequately compensated in a scheme where auction winners with whom it must compete are able to create

regulatory impediments to the smooth implementation of its wide-area system. The potential disruptions caused by this proceeding are contradictory to the express written intent of Congress:

Interruptions in the on-going filing, processing and approval of applications for licenses for existing services, which have not been characterized by rampant speculation, would be disruptive to business operations of existing wireless businesses and damaging to the economy.^{2/}

IV. Auctions are Unachievable for Fully-Occupied Spectrum

12. As the Commission admits throughout its decision in the First Report and Order, the 800 MHz SMR and GC spectrum is heavily licensed, and virtually fully occupied. With this known factor, Southern questions the Commission's attempt to auction spectrum that is already licensed. Simply stated, there is insufficient spectrum available to support geographic licensing or auctioning of the lower 80 SMR and GC channels. In its Comments filed in the first phase of this proceeding, Southern presented the Commission with statistical evidence that the upper 200 SMR frequencies in its service area were fully licensed. Although Southern has not conducted an empirical study of the channels in the lower 80 SMR and GC bands, licensing experience (as well as

^{2/} H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 263 (1993), 2 U.S.C.A.N. 590 (1993).

the Commission's own admission) indicates that lower 80 SMR or GC channels are likewise fully-licensed in its service area.

13. Without spectrum available for licensing, it remains difficult to discern what an auction participant will be bidding for. The proposed geographic license is an empty promise without spectrum. This is especially true when the benefits given to EA winners in the upper 200 SMR channels are notably absent for auction winners in lower 80 and GC bands. The spectrum scarcity dilemma will be exacerbated once incumbents relocated from the upper 200 SMR channels begin to occupy whatever spectrum is available in the lower 80 SMR and 150 GC bands. Considering this likely scenario, Southern believes that the Commission should, at a minimum, delay promulgating new licensing rules for these bands until the "dust has settled" from the auctioning of the upper 200 SMR channels. To move forward with these rules is a premature move that could result in costly and unnecessary disruptions for existing licensees which is contrary to the public interest and the intent of Congress.

V. Geographic Licensing for Lower 80 SMR and General Category Channels is Unworkable

14. The Commission proposes to license these channels using the Commerce Department's EA design. The Commission further proposes to license the lower 80 SMR channels in five-channel blocks and the GC spectrum in three blocks: 120-channel block, 20-channel block and 10-channel block.

Second NPRM ¶¶ 294 and 301. These proposals in light of the Commission's pronouncements in the First Report and Order are unachievable and irrational. The Commission admits in its First Report and Order that EA licensees operating in the upper 10 MHz SMR band will most likely need to relocate the incumbents to the lower 80 SMR and GC spectrum. First Report and Order ¶ 137. Additionally, the Commission stated that incumbents who have been relocated from the upper 200 SMR channels into either the lower 80 SMR or GC spectrum cannot be relocated again. First Report and Order ¶ 74. Many of these incumbents probably are licensed on non-contiguous SMR channels (especially where they can be relocated to the lower 80 SMR frequencies which are non-contiguous). Therefore, if these incumbents cannot be relocated a second time, it is highly likely that their presence will block the ability to auction the lower 80 SMR and GC spectrum on a geographic basis or some other specified channel-block basis (i.e., the proposed 16 five-channel blocks). Accordingly, the Commission cannot ensure

that geographic licensing is a feasible proposal for the lower 80 SMR and GC bands.

VI. Auctions in the Lower 80 SMR and General Category Bands Foster an Anticompetitive Environment

15. As Southern argued in regard to the upper 200 channel block, the auction process, in essence, can result in one winner (when aggregation of the spectrum blocks occurs) per market. While certain licensing privileges are extended to it (as they are in the upper 10 MHz SMR band), the auction winner may not receive any new spectrum, just marketing rights and regulatory tools to force competitors to other spectrum or to stifle their growth. The fact that auction winners in these lower 80 SMR and GC auctions will not have the same benefits as auction winners in the upper 200 EAs degrades the competitive picture even more.

16. Furthermore, the Commission is required to consider the antitrust consequences of its proposal and weigh the consequences with other public interest factors: "we are required to consider anticompetitive consequences as one part of our public interest calculus."^{8/} Failure to do so directly contravenes the public interest requirement of the Communications Act.

^{8/} In re Contel Corp., 68 R.R. 2d 1260 (1991) and United States v. F.C.C., 652 F.2d 72 (D.C. Cir. 1980)).

17. Although the FCC strenuously denies that it is operating under an "auction for auction's sake" mentality, there is no other rational explanation for its proposal to auction the lower 80 SMR and GC channels. From a competitive standpoint, no benefit is gained by driving out of business small SMR operators who have created a niche markets for themselves. This will be the end result when the lower 80 SMR and GC channels are auctioned. No benefit is derived by requiring SMR operators to pay for spectrum (via auctions) on which they are already licensed simply to maintain their authorizations. Unfortunately, the Commission continues to repeat the mantra that "licenses are awarded via the auction process to the applicant who values them the most" without any rational explanation of why this process benefits the public interest. What the Commission is most likely to accomplish is disruption in service to the public and stifled growth for existing SMR businesses. Even with the designation of this spectrum as an entrepreneurs' block, the Commission's proposed definition of small business is in terms of millions of dollars which generally are not the gross revenues seen by the small SMR operators. This entire proposal seems particularly irrational given that many entities currently licensed cannot be relocated and hence the spectrum could never be cleared. Southern

urges the Commission to revisit its proposal to compel auctioning of the lower 80 SMR and GC spectrum.

VII. SMRs Licensed on the Lower 80 SMR and General Category Channels Deserve Full Protection

18. Because Southern believes that this spectrum should not be auctioned in the first place, Southern supports the Commission's tentative decision not to require mandatory relocation of SMRs operating on these frequencies. Second NPRM ¶ 315. Southern believes that SMRs operating on these channels deserve full protection, and should not be subject to mandatory relocation. Southern also recommends that SMRs be equally protected from adjacent-channel interference.

VIII. Designation of the Lower 80 SMR and General Category Bands as an Entrepreneurs' Block is Inequitable to Incumbent SMRs

19. The Second NPRM proposes to license the lower 80 SMR and GC channels as an entrepreneurs' block. Second NPRM ¶ 305. This designation prevents some incumbents who desire to retain their channels from participating in the auctions because they may be ineligible if their gross revenues exceed the limits set. Southern will find itself in this situation, and although it highly values its licensed frequencies, it may not be able to keep them if it cannot participate in the auction. For these reasons, Southern

opposes the Commission's proposal to designate these channels as an entrepreneurs' block. Second NPRM ¶ 399. Southern does support, however, the proposed bidding incentives that would be offered to designated entities who desire to participate in the auction. Southern believes that these incentives are far more equitable than to restrict the entire auction to certain entities, foreclosing the opportunity for incumbent SMRs to maintain their frequencies by bidding in the proposed auctions.

IX. Geographic Licensing Requires Extended Construction Periods

20. Although the Commission proposes to license the lower 80 SMR and GC channels on a geographic basis, it nevertheless proposes to implement a 12-month construction requirement. Second NPRM ¶ 311. One of the Commission's goals in this proceeding appears to be to establish a set of parallel regulations for licensing 800 MHz SMR spectrum. Yet, it declines to afford licensees establishing a wide-area system on the lower 80 SMR and GC channels, with the same benefits, including construction requirements, as EA licensees in the upper 200 SMR block. The Commission offers no justification for this tentative decision, and Southern sees no reason why the same construction period should not be extended licensees operating on these frequencies if the decision is made to go forward with auctions despite

objections. A minimum construction period may be suitable for auction winners merely operating a five-channel SMR block. However, auction winners who have won larger channel blocks, or who aggregate their spectrum should be given extended construction periods.

X. Mandatory Relocation Rules for Upper 200 SMR Incumbents Must be Equitable

21. Southern is opposed to the idea of mandatory relocation for incumbents operating on the upper 200 SMR channels as decided in the First Report and Order. First Report and Order ¶ 73. Nevertheless, if this decision remains final, Southern believes that the procedures for such relocation should be equitable. Southern reiterates that the Commission cannot substitute the rationale for its decision in the 2 GHz band dockets in this proceeding. The services are completely distinct and require different treatment. Southern believes that incumbents should be given the right to request relocation rather than placing the relocation decision solely in the control of an EA auction winner. A request by an incumbent to be relocated should be prima facie evidence of a good faith desire to negotiate. Similarly, an EA auction winner's refusal to entertain such request should constitute bad faith dealings on the part of the EA auction winner. This recommendation is in line with the Commission desire to create as clear a spectrum band for

wide-area licensing as possible.^{9/} Southern also believes that an incumbent's counteroffer made during the mandatory relocation period should be evidence of good faith because not all offers made by the EA auction winner will be reasonable.

22. Second, Southern supports a pro rata cost-sharing plan among all EA auction winners. Second NPRM ¶ 269. This proposal ensures that all relocation costs will be borne by all EA winners benefitting from the relocation. Additionally, this plan should result in a rapid and smooth relocation because the incumbent will be able to negotiate a suitable relocation plan collectively with all EA auction winners and will not be required to negotiate independently with each EA licensee.

23. Southern supports the actual relocation costs as enumerated in the Second NPRM, but believes that costs associated with the relocation which are above actual relocation costs should also be reimbursable and factored in the relocation negotiations. But for the fact that

^{9/} "We conclude that a smooth and equitable transition to the new licensing framework . . . for the 800 MHz SMR service cannot be accomplished without some form of mandatory relocation. . . . The record supports our conclusion that voluntary negotiations in and of themselves will not be adequate to usher in the wide-area licensing approach we are implementing for the 800 MHz SMR service." First Report and Order ¶ 73.

incumbents are being forced to relocate, these costs would not be incurred or would not be an issue in negotiations. Therefore, Southern believes that premiums should be fully calculated in the relocation costs and divided among EA auction winners on a pro rata basis as well.

24. Regarding comparable facilities, Southern supports the Commission proposed definition of comparable facilities. Southern agrees that incumbents should be afforded the same number of channels with the same bandwidth, and incumbents should be allowed to relocate their entire system which maintains a service interference protection of 40 dBu. Moreover, Southern believes that EA licensees should be given the flexibility to relocate incumbents to other 800 MHz spectrum currently licensed to the EA auction winner regardless of the eligibility requirements. This will allow EA licensees to make greater use of the frequencies already licensed to them without putting undue strain on the available frequencies needed for existing licensees.

CONCLUSION

Imposing a geographically-defined licensing scheme for the lower 80 SMR and GC bands is anticompetitive in result and unachievable in light of the unavailability of SMR and GC frequencies. Southern urges the Commission, at a

minimum, to postpone acting on the proposals espoused in this rulemaking until the auction rules for the upper 200 SMR channels become final. At that point, the Commission may realize that auctioning these frequency bands is irrational.

WHEREFORE THE PREMISES CONSIDERED, The Southern Company respectfully requests that the Commission act upon its Second Further Notice of Proposed Rule Making in a manner consistent with the views expressed herein.

Respectfully submitted,

THE SOUTHERN COMPANY

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